

MAR 25 2009

MOLLY C. DWYER, CLERK
U.S. COURT OF APPEALS

NOT FOR PUBLICATION

UNITED STATES COURT OF APPEALS

FOR THE NINTH CIRCUIT

UNITED STATES OF AMERICA,

Plaintiff - Appellee,

v.

JOSE FRANCISCO PENA-AGUILAR,
AKA Jose Francisco Pena Aguilar,

Defendant - Appellant.

No. 08-10230

D.C. No. 4:07-cr-01673-JMR-1

MEMORANDUM^{*}

Appeal from the United States District Court
for the District of Arizona
John M. Roll, District Judge, Presiding

Submitted March 18, 2009^{**}

Before: LEAVY, HAWKINS and TASHIMA, Circuit Judges.

Jose Francisco Pena-Aguilar appeals from the 41-month sentence imposed following his guilty-plea conviction for illegal reentry, in violation of 8 U.S.C.

§ 1326. We have jurisdiction pursuant to 28 U.S.C. § 1291, and we affirm.

^{*} This disposition is not appropriate for publication and is not precedent except as provided by 9th Cir. R. 36-3.

^{**} The panel unanimously finds this case suitable for decision without oral argument. *See* Fed. R. App. P. 34(a)(2).

Pena-Aguilar contends that the district court erred by applying a 16-level enhancement under U.S.S.G. § 2L1.2(b)(1)(A)(ii) because his statements at a prior state change of plea hearing were insufficient to establish that his prior state conviction for aggravated assault was a crime of violence. Because the factual basis set forth at the prior state change of plea hearing establishes that Pena-Aguilar fought with and struck a police officer, we conclude that the offense was a crime of violence. *See* U.S.S.G § 2L1.2, cmt. n.1(B)(iii); *see also United States v. Smith*, 390 F.3d 661, 664-66 (9th Cir. 2004), *amended by* 405 F.3d 726 (9th Cir. 2005).

AFFIRMED.